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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION TO CHANGE A) PROPOSAL
WATER RIGHT NO. 41K-30010365 BY LLOYD AND) FOR
DANIELLE NEAL) DECISION

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on December 14, 2006, in Helena, Montana, to determine whether an authorization to change a water right should be issued to Lloyd and Danielle Neal, hereinafter referred to as "Applicant" for the above application, under the criteria set forth in Mont. Code Ann. § 85-2-402(2). Three claimed underlying water rights (41K-010765, 41K-010766, and 41K-010767) with common points of diversion and the same ditch delivery system are used to flood irrigate 526.9 acres. This change is to add a point of diversion and to move 16 acres of flood irrigation to 16 acres that have not been historically irrigated and are now irrigated by a center pivot located in Section 27, T21N, R7W. The water rights proposed to be changed in this application were listed in the required public notice.

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APPEARANCES

Applicant, Lloyd and Danielle Neal, appeared at the hearing by and through counsel, James A. Hubble of Hubble, Ridgeway, Unmack and

1 Westveer, Attorneys at Law, Stanford, MT. Besides testimony given by
2 the Applicant, Lloyd and Danielle Neal, witnesses Dick Klick, Nancy
3 Klick, and Josh Carlbom testified for the Applicant. Applicant also
4 called Department appointed expert witness, Mike Roberts, to testify.

5 Objector Tee Bar Ranch appeared at the hearing by and through
6 counsel, Holly J. Franz of Franz and Driscoll, Attorneys at Law,
7 Helena, MT. Ken Mosher testified on behalf of the objector, Tee Bar
8 Ranch. Ryan McLane of Water Right Solutions Inc. testified on behalf
9 of the objector.

10 EXHIBITS

11 Applicant offered nineteen (19) exhibits for the record. The
12 Objector offered nine (9) exhibits. The Hearing Examiner accepted and
13 admitted into evidence pre-labeled Applicants' Petitioner's
14 Exhibit(hereafter referred to as Applicants' Exhibit) Nos.
15 1,2,3,4,6,7,8,9,10,11,12,13,14,15a,15b,15c,16,17, and 18. The Hearing
16 Examiner accepted and admitted into evidence Objector's Exhibit Nos.
17 O-A, O-B, O-C, O-D, O-E, O-F, O-G, O-H, and O-J.

18 **Applicants' Exhibit 1** is a copy of a four page document titled
19 Lewis and Clark County, Classification and Appraisal Unit, Court
20 House, Helena, MT. "Individual Owner Agricultural Land Record"
21 depicting irrigated and non-irrigated lands specifically in the S2N2,
22 and S2 of Section 27, Township 21 North, Range 7 West on lands owned
23 in 1972 by Dolphus Dawson, Danielle Neal's father, and previous to
24 1970 by J. B. Long.

25 **Applicants' Exhibit 2** are copies of sixteen (16) pages of data

1 compiled by Lewis and Clark County, CAMA Code parcel information on
2 land use and ownership by Lloyd and Danielle Neal dated September 23,
3 2006 and depicting lands in Sections 26,27,28,32,33,34,and 35 of T21N,
4 R7W.

5 **Applicants' Exhibit 3** is a copy of portions of the Sun River
6 Decree Case No.4742, *McIver vs. Campbell*, District Court Decree of the
7 Eighth Judicial District of the State of Montana, in and for the
8 County of Cascade dated June 13, 1911 (also listed in Misc. Book 33,
9 page 527, Clerk and Records Office, Lewis and Clark County, Helena,
10 MT.) specifically depicting Findings of Fact and Conclusions of Law
11 respective of the Campbell's water rights, The Thomas Clark Company,
12 and the irrigation of lands now owned by Lloyd and Danielle Neal.

13 **Applicants' Exhibit 4** is a copy of page 42 of Township 21 North,
14 Range 6 & 7 West map from the *Lewis and Clark County Water Resources*
15 *Survey* publication along with copies of two documents consisting of
16 State Engineers Office field forms dated 8/9/56 and prepared by Clint
17 Furuholmen on the Edward T. & Helen G. Stenger land owner property and
18 8/23/56 & 8/24/56 on the Kenneth McLean and Fred Romain land owner
19 property, property currently owned by Applicant and subject to this
20 change application.

21 **Applicants' Exhibit 6** is a copy of a letter dated August 23, 1972
22 from Hans L. Bille, Surface Water Rights Coordinator, Water Resources
23 Division, Montana Department of Natural Resources and Conservation, to
24 Mr. Don Dawson of Augusta, Montana listing Water Resources Survey
25 information obtained from the State Engineers Office survey of water

rights of Little Willow Creek and its tributaries in the year of 1957,
and the ownership of those water rights as of the 1957 date based on
Sun River Decree Case No.4742.

Applicants' Exhibit 7 is a copy of an aerial photo map dated
September 6, 1938 with colored areas depicting irrigation on lands
located in Sections 27 & 34, T 21 N, R 7 W.

Applicants' Exhibit 8 are copies of General Abstracts depicting
statements of claim to the underlying water rights associated with the
Applicant's change authorization application (Water Right Claim Nos.
41K-10765, 41K-10766, 41K-10767).

Applicants' Exhibit 9 is a copy of the Application for Change
Authorization No. 41K-30010365 Criteria Assessment Review completed by
Denise Biggar, Water Resource Specialist, for the Water Resources
Division and dated October 14, 2003.

Applicants' Exhibit 10 is a copy of a letter dated April 26, 2004
from Terri McLaughlin, Manager of the Helena Regional Office, Water
Resources Division, to Mr. Rob Krause of the Natural Resource and
Conservation Service, Helena, Montana.

Applicants' Exhibit 11 consists of a letter addressed to Paul,
Lloyd, and Danielle Neal dated November 9, 2004 from Jim Beck, Ag
Specialist, Helena Water Resources Regional Office, and accompanied by
two pages of maps prepared by the DNRC depicting the proposed center
pivot, proposed new point of diversion, and claimed historical
irrigated acreages.

Applicants' Exhibit 12 is a copy of a Notice and Statement of

1 Opinion from Jim Beck, Water Resources Division Ag Specialist, dated
2 May 10, 2005 in reference to proposed conditions believed necessary to
3 satisfy the criteria listed under §85-2-402, MCA relevant to
4 Application for Change No. 41K-30010365 and signed and accepted by the
5 Applicant, Lloyd and Danielle Neal, on May 25, 2005.

6 **Applicants' Exhibit 13** consists of seven pages of hand-written
7 note copies indicating starting times for pivot operation and shut off
8 periods dating from July 15, 2005 to August 4, 2006.

9 **Applicants' Exhibit 14** consists of four undated copied pages from
10 Aquatech of Belgrade, MT including a page depicting a Clearwater Self-
11 Cleaning Suction Screen; a page depicting a Cornell Pump Company, 5RB,
12 1448 GPM, pump efficiency and capacity curve; a page depicting
13 recommended specifications for the Clearwater Suction Screen; and a
14 page depicting the center pivot hydraulic design signed by a Jim V.

15 **Applicants' Exhibit 15a** is a colored print of the United States
16 Geological Survey map, Split Rock Junction, Montana prepared by
17 Blend's Copy Shop of Great Falls, Montana.

18 **Applicants' Exhibit 15b** is a colored print of the United States
19 Geological Survey map, Barr Creek, Montana prepared by Blend's Copy
20 Shop of Great Falls, Montana.

21 **Applicants' Exhibit 15c** is a black and white copy of a map
22 depicting Townships 20 & 21 North, Range 6 & 7 West around the North
23 Fork Willow Creek and Willow Creek and showing Augusta, Montana,
24 Willow Creek Reservoir, and Nilan Reservoir with a written date of
25 September 15, 2006.

1 **Applicants' Exhibit 16** consists of copies of six pages which
2 include: (1) the front cover of *The Montana Irrigator's Pocket Guide*;
3 (2) a copy of page 5 of Pocket Guide showing Table 1., Typical
4 Irrigation System Application Efficiencies; (3) hand written notes
5 computing total water historically diverted for irrigation by the 3
6 claimed water rights being changed in this Application, and brief
7 comments relative to water structures, existing weir, an enclosed
8 drawing, and a comment on water commissioner history; (4) a copy of
9 page 164 of Pocket Guide showing a Water Equivalents Table; (5) a
10 construction drawing labeled Sawtooth Ranch Pump Suction; and (6) a
11 hand drawn map depicting claimed historic irrigation at the proposed
12 center pivot location.

13 **Applicants' Exhibit 17** is a copy of staff appointed expert
14 witness, Mike Roberts', file document, *Written Comments for the Neal*
15 *Change Application*, dated September 29, 2006 and consisting of five
16 written comment pages and six Crop Data Summary sheets. The Hearing
17 Examiner notes that this document is already part of the file.

18 **Applicants' Exhibit 18** is a copy of the Water Master's Report, by
19 Mr. Douglas Ritter, for the Water Court of the State of Montana, Sun
20 River Basin, Case No. 41K-37.

21 **Objector's Exhibit O-A** is a colored map showing scaled topography
22 of Sections 26 through 29 and Sections 32 through 35 of Township 21
23 North, Range 7 West with color outlined areas labeled and depicting
24 the place of use of Water Right Claim Nos. 41K-10766 and 41K-10767 as
25 decreed in the Sun River Decree Case No. 4742, *McIver v. Campbell*,

1 Eighth Judicial District in and for the County of Cascade, June of
2 1911.

3 **Objector's Exhibit O-B** is a colored map copy of lands located in
4 Township 20 & 21 North, Range 6 & 7 West, and specifically numbered
5 Sections 27, 28, 32, 33 and 34, T21N, R7W, with ditches and areas
6 irrigated depicted in different colors. The map copy is not dated.

7 **Objector's Exhibit O-C** is a colored map showing scaled topography
8 of Sections 26 through 29 and Sections 32 through 35 of Township 21
9 North, Range 7 West with colored outlined areas depicting the place of
10 use irrigated acres on Water Right Claim Nos. 41K-10765, 41K-10766,
11 and 41K-10767 labeled according to the Lewis and Clark County, Water
12 Resource Survey and Water Resources Survey field notes dated July,
13 1957.

14 **Objector's Exhibit O-D** is a colored map showing scaled topography
15 of Sections 26 through 29 and Sections 32 through 35 of Township 21
16 North, Range 7 West with colored outlined areas labeled and depicting
17 the place of use irrigated acres on Water Right Claim Nos. 41K-10765,
18 41K-10766, and 41K-10767 according to and as stipulated by the Montana
19 Water Court.

20 **Objector's Exhibit O-E** is a 2005 air photo of the Neal property
21 located in Township 21 North, Range 7 West, Sections 26 through 29 and
22 Sections 32 through 35, Lewis and Clark County dated 07/29/2005.

23 **Objector's Exhibit O-F** is a chart depicting the changes in flow
24 rate (expressed in GPM and percent change) respective to the
25 Applicant's underlying water rights at issue from a historical

1 entirely flood irrigation use on the acres irrigated to the proposed
2 center pivot design and remaining flow rate for flood irrigation use.

3 **Objector's Exhibit O-G** is a copy of Township 21 North, Range 6 &
4 7 West map from the *Lewis and Clark County Water Resources Survey* 1957
5 publication with a point of diversion notation on Willow Creek.

6 **Objector's Exhibit O-H** is a three page document entitled
7 *Professional Resume of Ryan P. McLane*.

8 **Objector's Exhibit O-J** is a copy of two documents consisting of a
9 state engineers office field form dated 8/23/56 & 8/24/56 and prepared
10 by a Clint Furuholmen on the Kenneth Mclean and Fred Romain land owner
11 property and a map document depicting lands associated with decreed
12 water use.

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15 The Hearing Examiner, having reviewed the record in this matter
16 and being fully advised in the premises, does hereby make the
17 following:

18 **FINDINGS OF FACT**

19 **General**

20 1. Application To Change A Water Right No. 41K-30010365 in the name
21 of Lloyd and Danielle Neal and signed by Danielle Neal was filed with
22 the Department on April 16, 2004. (Department file)

23 2. Notice of the Application was properly made in the Great Falls
24 Tribune on December 6, 2004.

1 3. The Environmental Assessment (EA) dated October 14, 2004,
2 prepared by the Department for this Application was reviewed and is
3 included in the record of this proceeding. (Department file)

4 4. Applicant proposes to change supplemental Water Right Claim Nos.
5 41K-010765, 41K-010766, and 41K-010767 by adding a new point of
6 diversion and a center pivot sprinkler irrigation system thus changing
7 the configuration of the acres historically flood irrigated in Section
8 27, T21N, R7W. The claims as filed and stipulated to by parties to the
9 Sun River Basin, Temporary Preliminary Decree, Montana Water Court
10 Case No. 41K-37 are jointly used for irrigation to flood irrigate a
11 total of 526.9 acres out of the North Fork of Willow Creek. Water
12 under the Water Right Claims to be changed is diverted from the North
13 Fork of Willow Creek from April 1 to October 19, inclusive, at points
14 of diversion in the NWSWSW & NESESW of Section 33 and the NWSW of
15 Section 34, T21N, R7W and conveyed in a common ditch delivery system
16 at a rate of 8.22 cubic feet per second (cfs), up to 3261 acre feet
17 per year, to the 526.9 acres located within Sections 27, 28, 32, 33
18 and 34, T21N, R7W, Lewis & Clark County. (Department file, Applicants'
19 Exhibit Nos. 8, 16, and 18, testimony of Lloyd and Danielle Neal)

20 5. The Applicant proposes to add a new point of diversion in the
21 SESENE of Section 27, T21N, R7W on Willow Creek downstream from the
22 current points of diversion on the North Fork of Willow Creek and
23 intends to use this additional point of diversion to supply irrigation
24 water at a rate of 1448 gallons per minute (GPM), equivalent to 3.22
25 cfs, to a 181.1 acre center pivot located in Section 27, T21N, R7W. A

total of 16 acres currently flood irrigated in the S2NESW of Section 27 will be taken out of irrigation production to allow for 16 new acres in the NESWSE, S2NESE, and SESE of Section 27, to be included within the total 181.1 acres under the center pivot. The remaining approximate 165 acres under the center pivot irrigation was historically flood irrigated. A total of 225.8 acres will be flood and sprinkler irrigated in Section 27, T21N, R7W, the same number of acres historically irrigated. The existing points of diversion on the North Fork of Willow Creek will continue to be used to supply water to the 345.8 acres remaining under historic flood irrigation in Sections 27, 28, 32, 33, and 34, T21N, R7W (526.9 acres minus 181.1 acres under the pivot). (Department file, testimony of Lloyd Neal)

6. The Department's database records currently confirm the following Water Right Claim parameters for supplemental Water Right Claim Nos. 41K-010765, 41K-010766, and 41K-010767:

<u>Water Right#</u>	<u>Priority Date</u>	<u>Historic Flow Rate</u>	<u>Period of Use</u>	<u>Historic Acres</u>
<u>10767-41K</u>	<u>12/31/1873</u>	<u>3.72 cfs</u>	<u>4/1 to 10/19</u>	<u>319.40</u>
<u>10766-41K</u>	<u>12/31/1891</u>	<u>3.00 cfs</u>	<u>4/1 to 10/4</u>	<u>207.50</u>
<u>10765-41K</u>	<u>6/01/1903</u>	<u>1.50 cfs</u>	<u>4/1 to 10/4</u>	<u>170.00</u>

7. The proposed project does not involve salvage water. (Department file, testimony of Lloyd Neal)

1 **Historic Use**

2 8. Applicants described the historic water rights as being for
3 irrigation water diverted from the North Fork of Willow Creek as per
4 Department database records Water Right Claims submitted with the
5 Application. See finding of fact No. 4 above. The water rights were
6 described in the application as running full limit (8.22 cfs) from
7 April 1 thru October 4; from October 4 thru October 19 running 3.72
8 cfs. Applicant and Applicant witnesses, Dick Klick and Nancy Klick,
9 described the claimed historic water right as being for rotational
10 flood irrigation of grasslands and grain crops on an area known as the
11 Big Flat located in the S2N2 and S2 of section 27, T21N, R7W. The area
12 was serviced by contour ditches originating from three points of
13 diversion on the North fork of Willow Creek, and was previously
14 irrigated by Kenneth McLean, Nancy Klick's father and since acquired
15 by Lloyd and Danielle Neal, has been continuously irrigated by Lloyd
16 Neal. (Department file, testimony of Lloyd and Danielle Neal, Nancy
17 Klick, and Dick Klick)

18 9. Evidence of historic irrigation consisted of a copied document
19 from the Lewis and Clark County Appraisal Unit depicting irrigated
20 lands located in the S2N2 and S2 of Section 27, T21N, R7W as 230 acres
21 tillable irrigated land prior to 1972 and in the year 1972 as 262.76
22 acres tillable irrigated land and assessed accordingly as irrigated
23 land. (Applicants' Exhibit No. 1)

24 10. Evidence submitted during Applicants' testimony is a map copy of
25 page 42 of T21N, R6&7 taken from the *Lewis and Clark County Water*

1 *Resources Survey* publication depicting acres irrigated specifically in
2 Section 27, T21N, R7W and field forms dated 8/9/1956. (Applicants'
3 Exhibit 4, testimony of Danielle Neal)

4 11. Evidence submitted during Applicants' testimony is a copy taken
5 from the Lewis and Clark County, CAMA Code parcel information on land
6 use and ownership by the Applicants dated September 23, 2006 and
7 depicting acres irrigated specifically in the S2N2 and S2 of Section
8 27, T21N, R7W as 225.8 acres. (Applicants' Exhibit 2, testimony of
9 Danielle Neal)

10 12. Evidence submitted during Applicant's testimony is a copy of
11 portions the Sun River Decree in *McIver vs. Campbell, June 13, 1911*,
12 Case No.4742, depicting Findings of Fact and Conclusions of Law
13 respective of the defendant's water rights, The Thomas Clark company,
14 and the irrigation of lands now owned by Danielle and Lloyd
15 Neal.(Applicants' Exhibit 3, testimony of Danielle Neal)

16 13. Evidence submitted during Applicants' testimony are copies of
17 general abstracts depicting stipulated statements of claim to the
18 underlying water rights associated with the subject change
19 authorization application and limits the acres irrigated in Section
20 27, T21N, R7W to 225.8 acres. (Applicants' Exhibit 8, testimony of
21 Lloyd Neal)

22 14. The Applicant submitted evidence in the file of a historical
23 concrete diversion structure with a 4 foot weir used for a part of the
24 three water diversion points from the North Fork of Willow Creek into

1 a common ditch delivery system which has an estimated total capacity
2 of 11 CFS.

3 15. Further evidence of historical use submitted during the
4 Applicant's testimony is a copy of the Water Master's Report, dated
5 January 17, 1996, for the Water Court, State of Montana, Sun River
6 Basin, Case No. 41K-37, specifically Water Right Nos. 41K-10765, 41K-
7 10766, 41K-10767. The Water Master's Report limits the period of use
8 of Water Right Nos. 41K-10765, 41K-10766, and 41K-10767 for the next
9 Decree in this Basin to **April 1 thru October 4** respectively.

10 (Applicants' Exhibit 18, testimony of Lloyd and Daniel Neal)

11 16. The Objector pointed out, through its expert witness, Ryan
12 McLane, that there are discrepancies between the 1911 Sun River
13 Decree, Case No. 4742 *McIver vs. Campbell* and Notices of Appropriation
14 that support the Applicants' water rights at issue, and the water
15 rights as described on the Applicants' abstracts for those rights,
16 particularly as to the place of use. On cross-examination, the
17 Objector's expert witness admitted the appropriator could have moved
18 the water rights prior to the enactment of the 1973 Water Use Act.
19 During the site visit by Department appointed staff expert witness,
20 Mike Roberts, contour ditches with a reasonable number of radial
21 ditches were observed to service the irrigated lands. Soils in the
22 area, glacial in origin, are dominantly comprised of the Soapcreek
23 silty clay and Fairway silt loam (NRCS Soil Survey, Lewis and Clark
24 County). Fine-grained soils of this nature increase conveyance
25 efficiency for water delivery. In addition, the ditches that

1 historically irrigated the lower field are relatively steep sloped
2 (1.0% to 1.5%) resulting in decreased infiltration loss during
3 transport. Mike Roberts concluded from his field observations that
4 attainable flood irrigation efficiencies of 30% to 50% are possible
5 for the Applicants' flood irrigation system assuming seasonal
6 availability of the flow rates associated with the underlying water
7 rights. The Applicant testified that water was continuously diverted
8 starting each April 1st from the three common diversions on the North
9 Fork of Willow Creek to the common delivery ditch system and used to
10 flood irrigate individual fields of rotational crops of grass hay,
11 grass alfalfa mix, and barley crops. The Applicant indicated a
12 production of one to two cuttings of hay and that water was sometimes
13 put onto the fields for late season forage growth. The Applicant
14 testified that once the water was diverted to the common ditch
15 delivery system, and the water was jointly used to irrigate the 526.9
16 acres of lands associated with the underlying water rights to be
17 changed, there was no way to individually account for each water right
18 flow rate and volume within the delivery system. The Applicant has
19 shown by preponderance of evidence that the historical irrigation of
20 lands located in the S2N2 and S2 of Section 27, T21N, R7W has a
21 historical irrigation water right to flood irrigate rotational crops
22 of grass and small grains on a total of 225.8 acres under supplemental
23 Water Right Claim Nos. 41K-10765, 41K-10766, 41K-10767 consistent to
24 the water rights stipulated to under the Sun River Basin, Temporary
25 Preliminary Decree, Case 41K-37, Lewis and Clark County. (Department

file, testimony of Ryan McLane, testimony of Mike Roberts, testimony of Lloyd Neal)

STIPULATED AGREEMENT CHART

<u>Water Right#</u>	<u>Priority Date</u>	<u>Historic Flow Rate</u>	<u>Period of Use</u>	<u>Historic Acres</u>
10767-41K	12/31/1873	3.72 cfs	4/1 to 10/4	319.40
10766-41K	12/31/1891	3.00 cfs	4/1 to 10/4	207.50
10765-41K	7/08/1911	1.50 cfs	4/1 to 10/4	170.00

Adverse Effect

17. Applicant is changing the configuration of acres irrigated by moving 16 acres currently flood irrigated in the S2NESW of Section 27, T21N, R7W to 16 new acres under the proposed 181.1 acre center pivot in the NESWSE, S2NESE, and SESE of the same Section 27. The application is an acre for acre change from flood irrigation to sprinkler irrigation. There are discrepancies between the Decrees, Notices of Appropriation, and current Department abstracts as to the acres irrigated. However, the Applicant provided credible evidence and testimony that the place of use was moved prior to the enactment of the 1973 Water Use Act. The Applicant has provided evidence and testimony that this application for change is not an expansion of the historic acres irrigated. The 181.1 acres as proposed to be irrigated under the center pivot and the remaining 44.7 acres of flood irrigation in Section 27, T21N, R7W for a total of 225.8 acres irrigated are consistent with the irrigation water rights stipulated

1 to under the Sun River Basin, Temporary Preliminary Decree, Case 41K-
2 37, Lewis and Clark County. (Testimony of Lloyd and Danielle Neal,
3 Applicants' Exhibits Nos. 1, 2, 4, 8, 11, and 18, Objector's Exhibit
4 O-A, O-B, O-C, O-D, and O-E)

5 18. Department appointed expert witness, Mike Roberts, performed a
6 site visit to the project on September 22, 2006, to assess the
7 irrigation operation using the Irrigation Water Requirements (IWR)
8 Program developed by NRCS. Net irrigation requirements (Crop
9 Consumptive Use requirements) were determined using information
10 gathered and available at that time on approximate acreages to assess
11 historic net irrigation consisting of rotational crops of pasture
12 grass and grains relative to the present (proposed) center pivot
13 system consisting of barley and possibly a rotational crop of alfalfa.
14 Mr. Roberts September 29, 2006 report entitled *Written Comments for*
15 *the Neal Change Application*, shows a net irrigation requirement for
16 the historic flood irrigation on pasture grass (most highly historical
17 consumptive use crop) is 16.48 inches per acre. The historic flood
18 irrigation would have required more annual volume of consumptive use
19 through the growing season than the irrigation of the present barley
20 crop under the center pivot. The net irrigation requirement for barley
21 is 11.11 inches per acre and has a shorter growing season than the
22 pasture grass. There is less consumptive use under the present center
23 pivot barley crop than the historic consumptive use with the pasture
24 grass irrigation. Whether a crop is flood irrigated or sprinkler
25 irrigated the crop consumptive use is the same, however, if a new crop

1 variety is irrigated that requires a higher consumptive seasonal use,
2 logically, more water may be taken from the source than historically
3 used to meet this new consumptive use requirement. If as proposed by
4 the Applicant, a new rotational alfalfa crop were placed under the
5 entire 181.1 acre center pivot system, the potential exists to exceed
6 the historical crop consumptive use. Mr. Roberts testified that by
7 using the NRCS net irrigation requirement of 17.22 inches per acre for
8 alfalfa, the crop consumptive use through the growing season would
9 increase and could exceed the historical irrigation consumptive use of
10 pasture grass (16.48 inches per acre) even though the growing season
11 is shorter for alfalfa than pasture grass in this climatic area. Using
12 Mr. Roberts' NRCS net irrigation requirement of 16.48 inches per acre
13 for the historic pasture grass in this climatic area on the 181.1
14 acres under the center pivot and previously flood irrigated in Section
15 27, T21N, R7W would historically have required 248.7 acre feet of crop
16 consumptive use. Again, using Mr. Roberts' NRCS net irrigation
17 requirement of 17.22 inches per acre necessary for a new alfalfa
18 rotational crop in this climatic area on the 181.1 acres under just
19 the center pivot would require 259.9 acre feet of crop consumptive use
20 which is an increase of 11.2 acre feet per year. Using Mr. Roberts'
21 system efficiency projection for the new center pivot and the
22 Applicant's supporting system design efficiency of 75%, the maximum
23 annual diversion available to the applicant at the center pivot
24 without exceeding the maximum historical consumptive use for pasture
25 grass would be limited to 331.6 acre feet per year. Mr. Roberts noted

1 that the center pivot operator currently takes notes of when the
2 center pivot pump is turned on and off and recommended the
3 installation of an in-line flow meter such that more accurate
4 measurements would be achieved. Mr. Roberts also recommended that a
5 plan of operation be implemented on the acres of rotational crops
6 grown in Section 27, T21N, R7W under the center pivot be documented
7 and that the timing and magnitude of the diversions be recorded to
8 assure that the maximum annual diversion of 331.6 acre feet of water
9 used on the center pivot is not exceeded. The Applicant has testified
10 and agreed to install an in-line measuring device on the center pivot
11 and implement an annual irrigation plan of operation. The Applicant
12 has provided a preponderance of evidence and testimony that this
13 change from historic flood irrigation of rotational crops to the
14 proposed center pivot system of rotational crops can be operated to
15 not adversely affect existing rights. Applicant also has the ability
16 to shutdown diversions should he receive a valid call. (Department
17 file, testimony of Mike Roberts, testimony of the Applicant)

18 19. Testimony given by the Applicant and exhibits presented at the
19 hearing verified that the proposed center pivot and new point of
20 diversion on Willow Creek have been installed and in operation since
21 July 15, 2005. Mike Roberts' testimony concerning what effect, if any,
22 the proposed project operation will have on downstream return flows to
23 Willow Creek from the change in point of diversion and historical use
24 operation was inconclusive. Mr. Roberts stated that although less
25 water is available for return flow from the center pivot than under

1 the historic flood irrigation scenario, water savings made at the
2 historic point of diversion will be realized as more stream flow in
3 lower North Fork Willow Creek than currently and more flow in Willow
4 Creek up to the new point of diversion assuming other remaining flood
5 irrigation remain consistent with historic practices. Mr. Roberts
6 further stated that any reduction in return flow volume based on the
7 change to sprinkler irrigation might be offset by this increase in
8 lower North Fork Willow Creek stream flow to satisfy the new diversion
9 requirement at the center pivot downstream. Josh Carlbom and the
10 Applicant testified at the hearing that there is more water flowing in
11 Willow Creek below the new point of diversion subsequent to the new
12 pivot. The Applicant testified that more water than the new pump
13 capacity on Willow Creek has to be diverted down the North Fork of
14 Willow Creek to the normally dry Willow Creek to effectively operate
15 the center pivot pump at the new point of diversion. Testimony by the
16 Applicant and Josh Carlbom supports Mr. Roberts analysis of no adverse
17 affect to flows to Willow Creek downstream in that this increase in
18 lower North Fork Willow Creek flows into Willow Creek to the new
19 center pivot pump site appears to provide carriage water for minimum
20 flows in Willow Creek and compensates for any reduced historic return
21 flows from the conversion from a flood irrigation system to the
22 sprinkler irrigation system. Mr. Carlbom measures the water in Willow
23 Creek below the Neal's new point of diversion for a ditch company and
24 irrigation districts that store water in the Willow Creek Reservoir
25 downstream. Mr. Carlbom stated that he has witnessed increased flows

1 in Willow Creek downstream subsequent to the Applicants' center pivot
2 development. From testimony provided, stream flows are not adversely
3 affected by the Applicant's proposed change. (Department file,
4 testimony of Mike Roberts, testimony of Josh Carlbom, testimony of the
5 Applicant)

6 20. Since the proposed new point of diversion for the center pivot
7 lies on Willow Creek rather than the North Fork of Willow Creek, the
8 Applicant could place a call for water from junior water right
9 holder(s) on Willow Creek upstream. As a result, the DNRC Helena
10 Regional Office in a Notice and Statement of Opinion issued prior to
11 the hearing the following conditions be placed on the Neal's
12 application to protect junior water right holder(s) on Willow Creek:

13 (1) With respect to the water rights changed under this
14 authorization and for the additional new point of diversion
15 authorized, the Applicants shall not exercise any right they may have
16 to call for water from junior water right holder(s) on Willow Creek.

17 (2) This right is subject to the authority of court appointed
18 water commissioners, if and when appointed, to measure and distribute
19 to the parties using water in the source of supply, the water to which
20 they are entitled. The appropriator shall pay his proportionate share
21 of the fees, compensation and expenses as fixed by the district court,
22 incurred in the distribution of the waters.

23 The Applicant signed and notified DNRC that the conditions were
24 acceptable on May 25, 2005. The Hearing Examiner notes that provisions
25 stated in condition No. 2 are already required by Montana Water Law if

1 there is a court appointed water commissioner. (Department file,
2 testimony of the Lloyd Neal)

3 21. The Objector, Ken Mosher, representing Tee Bar Ranch, testified
4 that Tee Bar Ranch is in most years subject to a call for water on
5 Willow Creek. Objector Mosher, is concerned that the Applicants change
6 to a new point of diversion on Willow creek may be an expansion of the
7 Applicants' water rights. Applicant testified that the new point of
8 diversion on Willow Creek as proposed at 3.22 cfs will not place an
9 additional burden on Willow Creek because there is no water in Willow
10 Creek at this point in the stream because of upstream irrigation
11 diversions. More than 3.22 cfs would have to be released down the
12 North Fork of Willow Creek to allow his center pivot pump to operate
13 on Willow Creek. To maintain production and to distribute water to
14 irrigated lands without affecting existing water rights, Applicant
15 must have properly functioning diversion dams, headgates, and
16 measuring devices on all three North Fork of Willow Creek diversions
17 and establish a plan of operation documenting the timing and magnitude
18 of diversions for these sites. This will ensure that no more than the
19 maximum remaining flow rate (5 cfs) is diverted from the North Fork
20 Willow Creek to continue to be used for the remaining 345.8 acres of
21 historical flood irrigation in sections 27, 28, 32, 33, and 34 when
22 the proposed point of diversion (center pivot) is operating at 3.22
23 cfs on Willow Creek. The Applicant verbally agreed with these proposed
24 recommendations at the hearing. Upon further questioning by the
25 hearings examiner, the Applicant also agreed to the placement of a

1 measuring device at the mouth of the North Fork Willow Creek to ensure
2 that only North Fork Willow Creek water is diverted at the new point
3 of diversion on Willow Creek. There are no other water users between
4 the mouth of the North Fork Willow Creek and the Applicants new point
5 of diversion downstream on Willow Creek. These measurements provided
6 by the Applicant in conjunction with an irrigation plan of operation
7 will protect the interests of water users on Willow Creek and limit
8 the Applicant to historic diversions from the North Fork of Willow
9 Creek. (Department file, testimony of Applicant, testimony of Mike
10 Roberts, testimony of Ken Mosher)

11 **Adequacy of Appropriation Works**

12 22. Applicant has used the new point of diversion to pump water to
13 the center pivot at a rate of 3.22 cfs during the 2005 and 2006
14 irrigation seasons and found the system to be adequate. Aquatech of
15 Belgrade, MT provided the pivot hydraulic design, Clearwater suction
16 screen, pump efficiency and capacity curve for the appropriation
17 works. The proposed appropriation works and operation of the proposed
18 works is adequate. (Department file, Applicants' exhibit 14, testimony
19 of Applicant)

20 **Beneficial Use**

21 23. Applicant has shown there will be a benefit to the appropriator
22 by use of the water for irrigation. Irrigation of crops is a
23 beneficial use. (Department file)

24. Assuming that the 3.22 cfs diverted at the new point of diversion on Willow Creek is not alternated between Willow Creek and the North Fork of Willow Creek, the use of the remaining 5.00 cfs of available flow rate over the growing season is the amount necessary to maintain net irrigation requirements on the remaining flood irrigated ground and would require an irrigation efficiency of 45% or less. A 45% irrigation efficiency is possible on this system with an operating plan and properly functioning diversion structures and measuring devices. The irrigation design efficiency for the center pivot of 75% is an NRCS irrigation water design standard and is supported by the Applicants' design plans provided by a professional consultant. The irrigation flow rates for the proposed flood (5 cfs) and sprinkler irrigation acreages (3.22 cfs) are the amounts necessary to sustain the beneficial use. The proposed irrigation use of water is a beneficial use of water. (Department file, testimony of Applicant, testimony of Mike Roberts)

Possessory Interest

25. Applicant has testified and proven by producing Lewis and Clark County Assessors records documenting that he has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file, testimony of Lloyd Neal)

Water Quality Issues

26. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability

1 of a discharge permitholder to satisfy effluent limitations of his
2 permit. (Department file)

3 Based upon the foregoing Findings of Fact and upon the record in
4 this matter, the Hearing Examiner makes the following:

5 **CONCLUSIONS OF LAW**

6 1. The Department has jurisdiction to approve a change in
7 appropriation right if the appropriator proves the criteria in Mont.
8 Code Ann. § 85-2-402.

9 2. The Department shall approve a change in appropriation right if
10 the appropriator proves by a preponderance of evidence the proposed
11 change in appropriation right will not adversely affect the use of the
12 existing water rights of other persons or other perfected or planned
13 uses or developments for which a permit or certificate has been issued
14 or for which a state water reservation has been issued; except for a
15 lease authorization pursuant to Mont. Code Ann. § 85-2-436, a
16 temporary change authorization for instream use to benefit the fishery
17 resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant
18 to Mont. Code Ann. § 85-2-439 when authorization does not require
19 appropriation works, the proposed means of diversion, construction and
20 operation of the appropriation works are adequate; the proposed use of
21 water is a beneficial use; except for a lease authorization pursuant
22 to Mont. Code Ann. § 85-2-436 or a temporary change authorization
23 pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439
24 for instream flow to benefit the fishery resource, the Applicant has a
25 possessory interest, or the written consent of the person with the

1 possessory interest, in the property where the water is to be put to
2 beneficial use; if the change in appropriation right involves salvaged
3 water, the proposed water-saving methods will salvage at least the
4 amount of water asserted by the Applicant; and, if raised in a valid
5 objection, the water quality of a prior appropriator will not be
6 adversely affected; and the ability of a discharge permitholder to
7 satisfy effluent limitations of a permit will not be adversely
8 affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

9 3. In a change proceeding, it must be emphasized that other
10 appropriators have a vested right to have the stream conditions
11 maintained substantially as they existed at the time of their
12 appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96
13 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 16.02(b)
14 (1991 edition); W.Hutchins, Selected Problems in the Law of Water
15 Rights in the West 378 (1942). Montana's change statute reads in part:

16 85-2-402. Changes in appropriation rights. (1) The right to make
17 a change subject to the provisions of this section in an existing
18 water right, a permit, or a state water reservation is recognized
19 and confirmed. In a change proceeding under this section, there
20 is no presumption that an applicant for a change in appropriation
21 right cannot establish lack of adverse effect prior to the
22 adjudication of other rights in the source of supply pursuant to
23 this chapter. An appropriator may not make a change in an
24 appropriation right except, as permitted under this section, by
25 applying for and receiving the approval of the department or, if
26 applicable, of the legislature. An applicant shall submit a
27 correct and complete application.

28 (2) Except as provided in subsections (4) through (6), the
29 department shall approve a change in appropriation right if the
30 appropriator proves by a preponderance of evidence that the
31 following criteria are met:

32 (a) *The proposed change in appropriation right will not*
33 *adversely affect the use of the existing water rights of other*
34 *persons or other perfected or planned uses or developments for*

1 which a permit or certificate has been issued or for which a
2 state water reservation has been issued under part 3.

3

4 (13) A change in appropriation right contrary to the
5 provisions of this section is invalid. An officer, agent, agency,
6 or employee of the state may not knowingly permit, aid, or assist
7 in any manner an unauthorized change in appropriation right. A
8 person or corporation may not, directly or indirectly, personally
9 or through an agent, officer, or employee, attempt to change an
10 appropriation right except in accordance with this section

11
12 (*italics added*).

13
14 Montana's change statute simply codifies western water law.¹ One
15 commentator describes the general requirements in change proceedings
16 as follows:

17 Perhaps the most common issue in a reallocation dispute is
18 whether other appropriators, especially junior appropriators, will be
19 injured because of an increase in the consumptive use of water.
20 Consumptive use may be defined as "diversions less returns, the
21 difference being the amount of water physically removed (depleted)
22 from the stream system through evapotranspiration by irrigated crops
23 or consumed by industrial processes, manufacturing, power generation
24 or municipal use." An appropriator may not increase, through
25 reallocation [changes] or otherwise, the historic *consumptive* use of
26 water to the injury of other appropriators. *In general, any act that*
27 *increases the quantity of water taken from and not returned to the*
28 *source of supply constitutes an increase in historic consumptive use.*
29 As a limitation on the right of reallocation, historic consumptive use
30 is an application of the principle that appropriators have a vested
31 right to the continuation of stream conditions as they existed at the
32 time of their initial appropriations.

¹ Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change ... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78
(italics added).

In Pueblo West Metropolitan District v. Southeastern Colorado
Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

[O]nce an appropriator exercises his or her privilege to change a
water right ... the appropriator runs a real risk of *requantification of
the water right based on actual historical consumptive use*. In such a
change proceeding a junior water right ... which had been strictly
administered throughout its existence would, in all probability, be
reduced to a lesser quantity because of the relatively limited actual
historic use of the right.

(italics added) See also 1 Wells A. Hutchins, Water Rights and
Laws in the Nineteen Western States, at 624 (1971) (changes in exercise
of appropriative rights do not contemplate or countenance any increase
in the quantity of water diverted under the original exercise of the
right; in no event would an increase in the appropriated water supply
be authorized by virtue of a change in point of diversion, place of
use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights
and Water Resources, at § 5.17[5] (1988) (*a water holder can only
transfer the amount that he has historically put to beneficial use and
consumed* - the increment diverted but not consumed must be left in the
stream to protect junior appropriators); Robert E. Beck, 2 Water and
Water Rights at § 16.02(b) at 271 ("The issues of waste and historic
use, as well as misuse, nonuse, and abandonment, may be properly be
considered by the administrative official or water court when acting
on a reallocation application," citing Basin Elec. Power Coop. v.
State Board of Control, 578 P.2d 557, 564 (Wyo. 1978)); Colo. Rev.
Stat. § 37-92-301(5) (in proceedings for a reallocation, it is

1 appropriate to consider abandonment of the water right).

2 The requirements of Montana's change statute have been litigated
3 and upheld in: In re Application for Change of Appropriation of Water
4 Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991) (Applicant for
5 a change of appropriation has the burden of proof at all stages before
6 the Department and courts, and the Applicant failed to meet the burden
7 of proving that the change would not adversely affect objectors'
8 rights; the application was properly denied because the evidence in
9 the record did not sustain a conclusion of no adverse effect and
10 because it could not be concluded from the record that the means of
11 diversion and operation were adequate).

12 Prior to the enactment of the Water Use Act in 1973 and the
13 promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a
14 change lawsuit was on the person claiming the change adversely
15 affected their water right, although the law was the same in that an
16 adverse effect to another appropriator was not allowed. Holmstrom Land
17 Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d
18 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060 (1980),
19 following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913);
20 Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974) (plaintiff could
21 not change his diversion to a point upstream of the defendants because
22 of the injury resulting to the defendants); McIntosh v. Graveley, 159
23 Mont. 72, 495 P.2d 186 (1972) (appropriator was entitled to move his
24 point of diversion downstream, so long as he installed measuring
25 devices to ensure that he took no more than would have been available

1 at his original point of diversion); Head v. Hale, 38 Mont. 302, 100
2 P. 222 (1909) (successors of the appropriator of water appropriated for
3 placer mining purposes cannot so change its use as to deprive lower
4 appropriators of their rights, already acquired, in the use of it for
5 irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959
6 (1896) (after the defendant used his water right for placer mining
7 purposes the water was turned into a gulch, whereupon the plaintiff
8 appropriated it for irrigation purposes; the defendant then changed
9 the place of use of his water right, resulting in the water no longer
10 being returned to the gulch - such change in use was unlawful because
11 it absolutely deprived the plaintiff of his subsequent right).

12 The DNRC in administrative rulings has held that a water right in
13 a change proceeding is defined by actual beneficial use, not the
14 amount claimed or even decreed. In the Matter of Application for
15 Change Authorization No.G(W)028708-41I by Hedrich/Straugh/Ringer,
16 December 13, 1991, Final Order ; In the Matter of Application for
17 Change Authorization No.G(W)008323-g76L by Starkel/Koester, April 1,
18 1992, Final Order.

19 In a change proceeding, the *consumptive* use of the historical
20 right has to be determined:

21
22 In a reallocation proceeding, both the actual historic
23 consumptive use and the expected consumptive use resulting from
24 the reallocation are estimated. Such estimates are usually made
25 by civil engineers. With respect to a reallocation, the engineer
26 conducts an investigation to determine the historic diversions
27 and the historic consumptive use of the water subject to
28 reallocation. This investigation involves an examination of
29 historic use over a period that may range from ten years to
30 several decades, depending on the value of the water right being

1 reallocated.

2

3 Expected consumptive use may not exceed historic consumptive use
4 if, as would typically be the case, junior appropriators would be
5 harmed. If an increase in consumptive use is expected, the
6 quantity or flow of reallocated water is decreased so that
7 consumptive use is not increased.

8
9 2 Water and Water Rights at § 16.02(b) at 279-80.

10 4. The Applicant has proven by a preponderance of evidence that the
11 use of existing water rights of other persons or other perfected or
12 planned uses or developments for which a permit or certificate has
13 been issued or for which a state water reservation has been issued
14 will not be adversely affected by adding a point of diversion
15 downstream provided the Applicant:

16 a. installs measuring devices to ensure that he diverts no more
17 water than would have been available at the historical points
18 of diversion;

19 b. develops and implements an annual irrigation plan of
20 operation;

21 c. agrees not to exercise any right they may have with respect
22 to the water rights changed under this authorization and for
23 the new point of diversion authorized, to call for junior
24 water right holder(s) on Willow Creek.

25 Applicant provided compelling evidence of prior historical use in
26 the form of exhibits and testimony made at hearing. There was
27 much discussion on the historical use of the underlying water
28 rights and the acres historically irrigated specifically in

1 Section 27, T21N, R7W. Applicant relied upon the testimony of
2 individuals familiar with the historic use; Water Resource Survey
3 documentation; Lewis and Clark County, Classification and
4 Appraisal Unit documentation; Individual Owner Agricultural Land
5 Records documentation and Cama Code parcel information
6 documentation. The Applicant in a change proceeding in Montana
7 must prove the historic beneficial use of the water to be
8 changed, no matter how recently the water right was decreed in
9 Montana's adjudication.² See McDonald v. State, 220 Mont. 519,
10 722 P.2d 598 (1986). The Hearing Examiner concludes that the
11 historic irrigation use is provided in the Applicants' documented
12 exhibits and supporting testimony. Mont. Code Ann. § 85-2-
13 402(2)(a). See Finding of Fact Nos. 7, 8, 9, 10, 11, 12, 13, 14,
14 15, 16, 17, and 18.

15 5. The Applicant has proven by a preponderance of evidence that the
16 proposed means of diversion, construction, and operation of the
17 appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b).
18 See Finding of Fact Nos. 5 and 22.

19 6. The Applicant has proven by a preponderance of evidence that the
20 quantity of water proposed to be used is the minimum amount necessary
21 for the proposed beneficial use. Mont. Code Ann. § 85-2-402(2)(c). See
22 Finding of Fact No. 23.

23 7. The Applicant has proven by a preponderance of evidence a
24 possessory interest in the property where water is to be put to
25 beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact

No. 24.

8. The application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(e). See Finding of Fact No. 6

9. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. §§ 85-2-402(2)(f), (g). See, Finding of Fact No. 26.

The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for authorization to change a water right.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application to Change a Water Right No. 41K-30010365 is hereby **GRANTED** to Lloyd and Danielle Neal.

The Appropriator is authorized to change Water Right Nos. 41K-010765, 41K-010766, and 41K-010767 by adding a new point of diversion in the SESENE of Section 27, T21N, R7W on Willow Creek. The additional point of diversion is downstream from the existing three points of diversion on the North Fork Willow Creek. The additional point of diversion will be used to divert North Fork Willow Creek water at a rate of up to 1448 gallons per minute (GPM), equivalent to 3.22 cfs, to a 181.1 acre center pivot located in Section 27, T27N, R7W, Lewis

1 and Clark County. A total of 16 acres flood irrigated in the S2NESW of
2 Section 27 will be taken out of irrigation production and replaced
3 with the 16 new acres to be irrigated under the center pivot in the
4 NESWSE, S2NESE, and SESE of Section 27. The total acres irrigated in
5 the S2N2 and S2 of Section 27, T21N, R7W is limited to the 225.8 acres
6 of historical use in any given year (181.1 acres under the center
7 pivot and 44.7 acres of flood irrigation). The existing three points
8 of diversion on the North Fork of Willow Creek will continue to be
9 used to supply water to the 44.7 acres remaining under flood
10 irrigation in Section 27 and the remaining historical acres irrigated
11 in Sections 28, 32, 33, and 34. The combined flow rate measurements of
12 the three diversions from the North Fork of Willow Creek and the new
13 diversion on Willow Creek shall not exceed the total historical
14 diversion rate of 8.22 cfs up to 3048.14 acre-feet per year.

15 A. This authorization is limited a total diversion rate of 8.22 cfs
16 in accordance with the Water Master's Report, dated January 17, 1996,
17 for the Montana Water Court, Sun River Basin, Case No.41K-37,
18 specifically supplemental Water Right Claim Nos. 41K-10765, 41K-10766,
19 and 41K-10767. The Water Master's report limits the period of use of
20 Water Right Claim Nos. 41K-10765, 41K-10766, and 41K-10767 for the
21 next Decree in this Basin to **April 1 thru October 4** respectively and
22 the priority date for Water Right Claim No. 41K-10765 as **July 8, 1911**.
23 The flow rate and volume for each water right up to a total of 3048.14
24 acre-feet per year is shown in the following table and will be updated

in the Department's database records and corresponding Water Right abstract.

<u>Water Right#</u>	<u>Priority Date</u>	<u>Historic Flow Rate</u>	<u>Historic Volume</u>	<u>Historic Acres</u>
<u>10767-41K</u>	<u>12/31/1873</u>	<u>3.72 cfs</u>	<u>1379.45 af</u>	<u>319.40</u>
<u>10766-41K</u>	<u>12/31/1891</u>	<u>3.00 cfs</u>	<u>1112.46 af</u>	<u>207.50</u>
<u>10765-41K</u>	<u>7/08/1911</u>	<u>1.50 cfs</u>	<u>556.23 af</u>	<u>170.00</u>

If the use is reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, this authorization will be limited to that lesser amount.

B. The appropriator shall install a department approved inline flow meter capable of measuring flow rate and total volume pumped at the new additional point of diversion (center pivot) on Willow Creek.

C. The appropriator shall install water measuring devices at the three (3) historic points of diversion on the North Fork of Willow Creek and one measuring device near the mouth of the North Fork of Willow Creek and record daily water flow measurements.

D. The flow rate of water diverted at the new point of diversion on Willow creek shall not exceed the flow rate recorded on the measuring device at the mouth of the North Fork of Willow Creek or 3.22 cfs, whichever is less.

1 E. The water can not be diverted until the required measuring
2 devices are in place and operating. The appropriator shall keep a
3 written daily record of the flow rates diverted.

4 F. The appropriator shall also develop and implement an annual
5 irrigation plan of operation documenting the timing and magnitude of
6 diversions from the North Fork of Willow Creek to confirm that there
7 is no expansion to historical use and that North Fork Willow Creek
8 water is available for diversion on Willow Creek as needed and used at
9 the center pivot point of diversion downstream on Willow Creek. When
10 331.6 acre-feet have been diverted in any given year from the Willow
11 Creek point of diversion to the 181.1 acres under the center pivot
12 located within Section 27, T21N, R7W, Lewis and Clark County, water
13 shall be no longer diverted from the new point of diversion granted by
14 this change authorization.

15 G. Water measurement records shall be submitted by November 30th of
16 each year or upon request at other times during the year. Failure to
17 submit records may be cause for revocation or modification of a permit
18 or change. The records must be submitted to the Helena Water Resources
19 Regional Office.

20 H. The appropriator shall maintain the measuring devices so they
21 always operate properly and measure accurately.

22 I. The appropriator shall not call for water from junior water right
23 holder(s) on Willow Creek with respect to the water rights changed
24 under this authorization and for the additional new point of diversion
25 authorized.

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NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by August 17, 2007, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by August 31, 2007, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 18th day of July, 2007.

/Original signed by Bob L Larson
by e-signature/
Bob L Larson
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 1828
Havre, Montana 59501-1828

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Cc:
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Jamie Price
Administrative Support